ORIGINAL

No. 90-112

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

EDDIE S. RUST, Warden, Petitioner,

v.

VENSON LANE MYERS, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should plenary review on certiorari be granted to decide: (1) Whether a decision that a state court must afford similar treatment to similarly situated litigants, with respect to an issue of state law, is a "new" rule under Teague v. Lane and its progeny; and

(2) Whether the guarantee of equal protection of the laws permits a state court to afford radically inconsistent treatment to similarly situated litigants, when there is no justification for the distinction in treatment.

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Respondent VENSON MYERS respectfully prays that this Court deny the petition for certiorari, seeking review of the decision of the Court of Appeals for the Ninth Circuit in this case. That opinion is reported at 897 F.2d 417.

STATEMENT OF THE CASE

This case involves a denial of equal protection of the laws by the highest court of a state in its application of state law. The facts relevant to the issue presented here are as follows:[1/]

In 1984, the California Supreme Court had before it four cases involving the same issue: whether, under the state constitution, a prima facie showing of systematic racial underrepresentation in criminal jury venires could be made by relying upon gross population statistics or required refinement of the statistical data to isolate the jury-eligible population. These cases were respondent's (People v. Myers, Crim. No. 21991); People v. Harris, Crim. No. 21633; In re Rhymes, Crim. No. 22024; and People v. Bell, Crim. No. 20879. Myers, Harris and Bell were before the Supreme Court on automatic appeals of judgments of death. The Supreme Court granted hearing in Rhymes after a decision in the California Court of Appeal affirming the lower court's reversal of a conviction on the ground of systematic underrepresentation shown by gross population statistics.[2/]

[1/] The facts of respondent's conviction of murder with a special circumstance. (Cal. Pen. Code, §§ 187, 189, 190.2, subd. (a)(17)(i)) are not at issue here.

[2/] Under California law in effect at the time, the grant of hearing in Rhymes completely nullified and superseded the [Fn. cont.]

Rhymes and Myers arose in the same county at the same time, and the jury selection question in each case had been litigated upon an essentially identical, common factual record.

In 1984, the California Supreme Court issued its opinion in Harris and decided under the California constitution that a showing of systematic underrepresentation could be predicated upon gross population statistics. People v. Harris, 36 Cal.3d 36, 48, 59, 201 Cal.Rptr. 782, 679 P.2d 433 (1984). The court reserved the question of the retroactivity of the decision. Id. at 59.

In 1985, the Supreme Court, without any reference to retroactivity, ordered the Rhymes case returned to the Court of Appeal with explicit directions to file its former opinion, thus ordering the reversal of the case. See In re Rhymes, 170 Cal.App.3d 1100, 217 Cal.Rptr. 439 (1985).[3/]

Then, in 1987, the Supreme Court decided respondent Myers' case. Although acknowledging that the issue, and the record supporting it, were identical in Myers and Rhymes,

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[Fn. cont.]

Court of Appeal decision and transferred the case in its entirety to the Supreme Court for plenary consideration. Knouse v. Nimocks, 8 Cal.2d 482, 483, 66 P.2d 438 (1937).

3/ Under California law, the Court of Appeal was without jurisdiction to act in any way other than as directed by the Supreme Court. Auto Equity Sales, Inc. v. Superior Court, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321 369 p.2d 937 (1962).

respondent's case on the theory that Harris was not retroactive. People v. Myers, 45 Cal.3d 250, 261, 233 Cal.Rptr. 264, 729 P.2d 698 (1987). The Supreme Court did not address the equal protection issue raised by its action in ordering the reversal of Rhymes' conviction on the basis of a rule which it then refused to apply to respondent on an identical record presenting the same issue. This issue was specifically drawn to the Court's attention in respondent's petition for rehearing.

Finally, in 1989, the Supreme Court again applied the Harris rule in Bell, without any reference to the purported retroactivity rule relied upon in respondent's case. "Because the court accepted total population figures rather than adult, presumptively jury eligible, population figures to establish a prima facie case in People v. Harris . . . we do so here." People v. Bell, 49 Cal.3d 502, 526 n. 12, 262 Cal.Rptr. 1, 778 P.2d 129 (1989) (emphasis supplied).4/

Respondent's petition for a writ of habeas corpus under 28 U.S.C. § 2254 was denied by the United States District Court for the Central District of California in a judgment and order which failed to address respondent's equal protection claim. On appeal, the Court of Appeals for the Ninth Circuit reversed, with one judge dissenting from

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4/ The Bell case was drawn to the attention of the Court of Appeals under Rule 28(j) of the Federal Rules of Appellate Procedure but it was not cited in its opinion.

the panel opinion. The court held that respondent's rights under the equal protection clause of the Fourteenth Amendment had been violated, because "once a state has established a rule it must be applied evenhandedly." Myers v. Ylst, 897 F.2d 417, 421 (9th Cir. 1990), quoting La Rue v. McCarthy, 833 F.2d 140, 142 (9th Cir. 1987), citing Johnson v. State of Arizona, 462 F.2d 1352, 1354 (9th Cir. 1972).

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REASONS FOR DENYING THE WRIT

I

AN APPLICATION OF THE EQUAL PROTECTION CLAUSE REQUIRING A STATE TO TREAT SIMILARLY-SITUATED LITIGANTS SIMILARLY DOES NOT IMPOSE A "NEW RULE" WITHIN THE MEANING OF TEAGUE v. LANE

Petitioner argues that the equal protection rule applied in this case is a "new rule" within the meaning of Teague v. Lane, 489 U.S. ___, 103 L.Ed.2d 334, 356, and its progeny. Petitioner's argument assumes that over a hundred years of this Court's jurisprudence applying the equal protection clause of the Fourteenth Amendment has not yet established the rule that a state court, in applying state law, must treat similar cases similarly. Petitioner's assertion that certiorari should be granted to address this question is nonsense.

It has long been settled that the application of state law by a state court can violate the equal protection clause. In an unquestioned line of cases extending from Virginia v. Rives, 100 U.S. 313, 318 (1880), through Shelley v. Kraemer, 334 U.S. 1, 14-15 (1948), to Columbus Board of Education v. Penick, 443 U.S. 449, 457 n. 5 (1979) this Court has held that the actions of a state court, like the actions of any state agency, are subject to scrutiny for equal protection violations. Accord, Palmore v. Sidoti, 466 U.S. 429, 432-435 (1984) [reliance by state court on racial factor in making child custody decision]; Draper v. Washington, 373 U.S. 487, 489-490, 494-499 (1963)

[application of state court's rules on entitlement to transcript on appeal]. There is no novelty in the application of the Fourteenth Amendment to the actions of a state court.

It is equally well-settled that, substantively, the equal protection clause requires states to apply state law rules evenhandedly and thus to treat similar cases similarly. The clause guarantees "the right . . . to equal treatment. . . ." Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 247 (1931). "Equal protection of the laws requires equal operation of the laws upon all persons in like circumstances." Maxwell v. Bugbee, 250 U.S. 525, 541 (1919). "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike'." Plyler v. Doe, 457 U.S. 202, 216 (1982), quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). The cases in which this Court has applied this principle, which is obvious from the plain words of the equal protection clause itself, are too numerous to rehearse; and its application by the Court of Appeals in this case breaks no new ground.

Petitioner's attempt to characterize the Court of Appeals' application of these unquestioned principles as a "new rule" under Teague is ridiculous. The application of the equal protection clause in this situation is clearly "controlled" by this Court's precedents. See Butler v. McKellar, 494 U.S. ___, 108 L.Ed.2d 347, 356 (1990). A contrary ruling would mean that the Fourteenth Amendment --

a provision specifically directed at curbing state action -- could never be applied to a state court conviction on collateral review, regardless of how clearly prior caselaw mandaqted its application. Nothing in Teague or its progeny suggests so bizarre a result.

The flimsiness of petitioner's claim on this point is accentuated by its failure to advance the Teague argument before the filing of the petition for rehearing in the Court of Appeals. Teague was decided on Feburary 22, 1989, 103 L.Ed.2d 334, well before the oral argument in this case (which was held in the Court of Appeals on April 4, 1989), and over a year before the decision was issued (on February 28, 1990). Yet petitioner neither alluded to Teague in argument, nor sought to draw the decision to the attention of the Court of Appeals after argument, under Rule 28(j) of the Federal Rules of Appellate Procedure. This strongly suggests that petitioner's invocation of Teague is a belated attempt to inject an issue ostensibly justifying review on certiorari where no such issue in fact exists in the case.

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II

THE INCONSISTENT TREATMENT AFFORDED BY THE CALIFORNIA SUPREME COURT TO SIMILARLY SITUATED LITIGANTS WHOSE CASES PRESENTED THE IDENTICAL ISSUE VIOLATED THE EQUAL PROTECTION CLAUSE

There is no factual dispute as to the actions of the California Supreme Court which give rise to respondent's equal protection claim. The court enunciated a rule of state law in Harris; it ordered the reversal of the conviction in Rhymes on the basis of the same interpretation of the state rule; it then denied the benefit of that rule to respondent, whose case presented the identical issue, on the same record, as in Rhymes; and it then applied the rule again in Bell. The imagination could not construct a more obvious instance of a state rule "applied. . . with an evil eye and an unequal hand," Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886) which violates the equal protection clause. No plausible argument can be made that review on certiorari is necessary to reiterate this Court's consistent jurisprudence condemning such unequal treatment.

Petitioner, and the dissent in the Court of Appeals, mischaracterize respondent's claim as an effort to dictate to the California Supreme Court in which case--Rhymes or Myers--it would decide the question of the retroactivity of Harris. Petition at 28; Myers v. Ylst, supra, 897 F.2d at 426 (Kozinski, J., dissenting). This is inaccurate. The question is not one of form, as to which case should have been decided first. Rather, it is a

question of substance: whichever case was the vehicle for deciding whether Harris was retroactive, the other, similarly-situated case had to be decided the same way so that each case would receive "equal protection"--that is, equal application or non-application--of the Harris rule. What is wrong with this case is that the California Supreme Court refused to apply the Harris rule here, purportedly on the basis of retroactivity, but it had already directed the reversal of the conviction in Rhymes without any mention of retroactivity, and it subsequently applied Harris in Bell, again without any mention of retroactivity. This case presents a clear situation of a state court arbitrarily applying a rule of state law; it is precisely this unequal treatment that the equal protection clause of the Fourteenth Amendment does not permit.

The sole rationale advanced for the difference in treatment between respondent's case and Rhymes is that the California Supreme Court's disposition of Rhymes was a "housekeeping" measure. Myers v. Ylst, supra, 897 F.2d at 426 (Kozinski, J., dissenting). Petitioner seeks to inflate this by characterizing it as the court's "management of its docket" and its "shaping of state law." Petition at 22, 32. There is, however, not one scintilla of evidence in the record in this case to support such a conclusion: nothing in the Supreme Court's order in Rhymes or decision in Myers suggests this rationale.

Neither does petitioner, or the dissenting judge in the Court of Appeals, explain how the mere convienience of a court in disposing of its cases creates a "difference" which bears a "fair relationship to a legitimate public purpose" Plyler v. Doe, 457 U.S. 202, 216 (1982), which would justify completely different treatment of litigants whose cases present an identical issue and which are pending before the same court at the same time. Still less does this "housekeeping" theory distinguish between similarly-situated cases in a way which is "precisely tailored to serve a compelling governmental interest", id. at 217, the standard which would apply to the proffered distinction in light of the state's obligation to conduct its system of appellate review consistent with the demands of due process of law. See Evitts v. Lucey, 469 U.S. 387, 401-405 (1985).

This "housekeeping" theory also depends upon interpretation of the state procedural rules relating to petitions for hearing to determine the effect of the California Supreme Court's action in Rhymes. Myers v. Ylst, supra, 897 F.2d at 422-423; id. at 426-428 (Kozinski, J., dissenting). Those rules are no longer in effect, see West's Cal. Rules of Court, Rule 29.4 and Advisory Committee Comment, at p. 30 (1986); and this renders review on certiorari particularly inappropriate. Rice v. Sioux City Cemetery, 349 U.S. 70, 77 n. 1 (1955).

Finally, whatever purported distinction may be suggested between respondent's case and Rhymes, there is no

such distinction between respondent's case and Bell. Both Myers and Bell were capital cases, pending before the California Supreme Court at the same time; and the jury selection in Bell predated the jury selection in Myers. See People v. Bell, supra, 49 Cal.3d at 513, 521; People v. Myers, supra, 43 Cal.3d at 255, 260-261. Yet the California Supreme Court applied the Harris rule retroactively in Bell, 49 Cal.3d at 526 n. 12, after denying respondent the benefit of that rule on the supposed ground of non-retroactivity. Although the Bell decision was drawn to the attention of the Court of Appeals before its decision, neither the dissenting judge in the Court of Appeals, nor the state in its petition for certiorari, suggests any reason why Bell should have the benefit of the supposedly non-retroactive Harris rule while respondent was denied that benefit. The complete absence of any conceivable rational distinction between Bell and Myers to justify the application of Harris in one case and not the other is a clear demonstration of the equal protection violation, irrespective of any purported justification for the difference in treatment in Rhymes. This, in turn, renders the question presented by the petition for certiorari inappropriate for certiorari review.

We submit that the constitutional principle at issue is quite clear; the only basis for believing that a ruling in this case would have an important or widespread effect would be the assumption that state courts do habitually apply state law rules in an arbitrary fashion. Absent

that assumption, there is no basis for characterizing the plain and simple application of the equal protection clause to this case as presenting an important or novel question of constitutional law which would justify an exercise of this Court's discretionary jurisdiction. See Supreme Court Rule 10.1. To the contrary, this case presents an application of "settled [constitutional] law," Estelle v. Gamble, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting), to an "isolated incident", Rice v. Sioux City Cemetery, supra, 349 U.S. at 77, which makes "review on certiorari . . . patently inappropriate." R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 223 (6th ed. 1986).

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I served a copy of the accompanying BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI and MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, by depositing a copy of each document in the United States mail, first class mail, postage prepaid, addressed as follows:

JOHN VAN de KAMP
Attorney General of the
State of California
3580 Wilshire Boulevard
Los Angeles, CA 90010
Attention: Thomas L. Willhite, Jr.

All parties required to be served have been served.
Done this 16th day of August, 1990.

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CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

DATED: August 16, 1990

Respectfully submitted,

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MP:vb